

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

NAM QUACH

Claimant,

vs.

CS-00-0082-581

AP-00-0450-504

TYSON FRESH MEATS, INC.

Self-Insured Respondent.

ORDER

Claimant requested review of the April 13, 2020, Award issued by Administrative Law Judge (ALJ) Pamela J. Fuller.

APPEARANCES

Scott J. Mann appeared for Claimant. Gregory D. Worth appeared for Self-Insured Respondent.

RECORD AND STIPULATIONS

The Board considered the record and adopted the stipulations listed in the Award, consisting of the Transcripts of Regular Hearing held December 17, 2019; Continuation of Regular Hearing by Deposition of Nam Quach held January 8, 2020; Preliminary Hearing held November 6, 2017; Evidentiary Deposition of Erich Lingenfelter, M.D., taken January 23, 2020, with Exhibits 1-6; Evidentiary Deposition of Steve Benjamin taken January 29, 2020, with Exhibits 1-3; Evidentiary Deposition of Dawn Ketelsen taken February 4, 2020, with Exhibits 1-5; Deposition of Robert W. Barnett, Ph.D., taken February 28, 2020, with Exhibits 1-3; Evidentiary Deposition of David Hufford, M.D., taken February 20, 2020, with Exhibits 1-6; the narrative report of Dr. Hufford concerning his Court-ordered independent medical examination; and the pleadings and orders contained in the administrative file. The Board also reviewed the parties' briefs and heard oral argument on July 16, 2020.

ISSUES

1. What is the nature and extent of the disability Claimant sustained due to his work-related injuries, including entitlement to permanent partial general disability compensation based on work disability?
2. Is Claimant entitled to an award of future medical treatment?

FINDINGS OF FACT

Claimant is sixty-five years of age, and emigrated to the United States from Vietnam in 2007. Claimant possesses a ninth grade education, and attended a Chinese language school in Vietnam. Claimant does not speak, read or write in English.

Claimant was employed by Respondent from 2009 through November 21, 2019, as a meat trimmer at the Holcomb plant. Claimant stood at a conveyor belt and used a hook to catch pieces of meat weighing approximately thirty pounds. Claimant had to bend forward and reach overhead to catch the pieces of meat, which he would trim with a knife in his other hand. Claimant performed this work repetitively over an eight-hour shift, and he estimated he reached forward and trimmed 5000-6000 pieces of meat during a normal shift.

Claimant developed bilateral shoulder pain due to his work activities. Claimant initially treated with Dr. Lucas, who diagnosed bilateral rotator cuff tears. Dr. Lucas performed surgery on the right shoulder. Claimant was placed on light-duty restrictions and Respondent accommodated.

Claimant also received treatment from Dr. Lingenfelter for post-surgical adhesive capsulitis and pain of the right shoulder and a rotator cuff tear and bursitis of the left shoulder. Dr. Lingenfelter provided conservative treatment and administered injections into both shoulders, with some improvement. A Functional Capacities Evaluation (FCE) was ordered after Claimant told Dr. Lingenfelter he was not interested in undergoing additional surgery. The FCE was performed on April 8, 2019. On April 22, 2019, Dr. Lingenfelter imposed permanent restrictions of no pushing or pulling over fifty pounds at or below waist, no lifting greater than twenty pounds above the shoulder, and lifting as tolerated at the waist level. Dr. Lingenfelter acknowledged his restrictions were not as extensive as the restrictions recommended in the FCE, partly driven by Dr. Lingenfelter's desire to allow Claimant to continue working. Dr. Lingenfelter declared Claimant at maximum medical improvement on April 22, 2019, and released Claimant from treatment.

Upon Dr. Lingenfelter's release from treatment, Claimant returned to work for Respondent. Claimant was offered his old position, which would have paid the same as before but Claimant told Respondent he was physically incapable of performing it based on restrictions imposed on April 24, 2018. Under Respondent's internal procedure, Claimant was not required to return to his old position. Instead, Claimant was invited to bid for other positions at the plant every Tuesday. If Respondent had an open position within Claimant's medical restrictions Claimant was interested in performing, a trainer would review the mechanics of the position with Claimant and Claimant could bid for the position based on seniority. Claimant would get the position if he was the bidding employee with the most seniority. Different positions became available each week, and Ms. Ketelsen was Claimant's contact for the bidding process.

Claimant initially appeared on April 7, 2019, and bid for one position he did not receive due to seniority. Claimant returned on April 30, 2019, and four positions were identified within Claimant's medical restrictions. One of the four positions would have been Claimant's if he had asked for it, but it is unclear whether the position would have paid 90% of Claimant's average weekly wage or whether the position complied with Dr. Lingenfelter's restrictions or Dr. Hufford's restrictions. Claimant was not offered a position because he was not wearing the proper footwear, although he was invited to return with the proper attire to have the positions shown to him. Claimant did not return. Claimant next appeared at Respondent's location on June 25. At that time, a trimming job was identified, but Claimant refused to bid for it. Claimant next returned to bid on August 8, but he did not bid on any jobs. Claimant never returned. A representative from Respondent called Claimant's home after August 8, and Claimant's wife said Claimant was retiring. Claimant's employment with Respondent was terminated on November 21, 2019, and "retirement" was the given reason for Claimant's termination.

Claimant's average weekly wage, without additional compensation, is \$637.90. The value of additional compensation Claimant received was \$103.78 per week, which was discontinued on November 21, 2019. Claimant's average weekly wage increased to \$741.68 when his fringe benefits were discontinued on November 21, 2019.

Claimant moved to Kansas City to live with his son. Claimant is not seeing any medical providers for his shoulders.

Dr. Lingenfelter rated Claimant's functional impairment at 2% of each shoulder under the *AMA Guides to the Evaluation of Permanent Impairment*, Sixth Edition (*AMA Guides*, Sixth Edition) without explanation. Dr. Lingenfelter did not provide a whole-body conversion, but Dr. Hufford testified under the *AMA Guides*, Sixth Edition, 2% of each shoulder converts to 2% of the body as a whole. Dr. Lingenfelter also admitted Claimant would be at risk of reinjury if he engaged in work requiring him to reach above his shoulders and pull objects weighing thirty pounds 3000 times per day. Dr. Lingenfelter recommended future medical in the form of prescription medications, injections, physical therapy and left shoulder surgery. Dr. Lingenfelter reviewed a task list prepared by Mr. Benjamin, and thought Claimant could perform all of the tasks based on Dr. Lingenfelter's restrictions.

Dr. Hufford performed a Court-ordered independent medical examination of Claimant on September 5, 2019. Dr. Hufford reviewed Claimant's course of medical treatment and performed a physical examination notable for reduced range of motion on the right side compared to the left, reduced strength and signs of rotator cuff injuries. Dr. Hufford diagnosed bilateral rotator cuff tears, with surgery on the right side and injections on the left side. Dr. Hufford confirmed Claimant's work activities were the prevailing factor causing the injuries. The FCE was reviewed. Based on range of motion, Dr. Hufford rated Claimant's functional impairment at 8% of each shoulder, or 10% of the body as a whole, under the *AMA Guides*, Sixth Edition. Dr. Hufford imposed permanent restrictions of no

lifting greater than ten pounds with either arm occasionally, no lifting more than twenty pounds with both hands occasionally, no pushing or pulling horizontally more than twenty-five pounds, no overhead use of either arm, and no pushing or pulling more than thirty pounds constantly. Dr. Hufford reviewed the task lists prepared by Mr. Benjamin and Dr. Barnett, and thought Claimant sustained a task loss of 50% under either list. Dr. Hufford confirmed Claimant could not perform his old job if it required reaching over the shoulder. Dr. Hufford did not recommend future medical treatment.

Dr. Barnett performed a vocational assessment at Claimant's request. Dr. Barnett understood Claimant had a ninth-grade education, lacked English skills and worked for Respondent for five years. Dr. Barnett understood Claimant resided in the Garden City, Kansas area, rather than Kansas City, and did not know Claimant's immigration status. Dr. Barnett prepared a job task list. Based on his review of Dr. Murati's restrictions, Dr. Barnett prepared a report stating Claimant was unemployable without further study of the labor market. At his deposition, Dr. Barnett opined Claimant was unemployable based on the FCE results, as well.

Mr. Benjamin performed a vocational assessment at Respondent's request. Mr. Benjamin interviewed Claimant over the phone with an interpreter, and reviewed medical reports from Drs. Lingenfelter, Murati and Hufford, as well as the FCE. Mr. Benjamin prepared a list of job tasks. Mr. Benjamin also conducted a wage-earning analysis based on Claimant's age, education, work history, language skills, and residency in Kansas City. Based on Dr. Lingenfelter's restrictions, Mr. Benjamin thought Claimant could earn \$498.00 per week working forty hours per week and fringe benefits averaging \$153.20 per week. Based on Dr. Hufford's restrictions and Dr. Murati's restrictions, Mr. Benjamin thought Claimant could earn \$434.56 per week.

In her Award, dated April 13, 2020, ALJ Fuller found the opinions of Dr. Hufford more credible on functional impairment, and found Claimant's functional impairment was 8% of each shoulder, or 10% of the body as a whole, under the *AMA Guides*, Sixth Edition. The Court declined to award Claimant permanent partial general disability compensation based on work disability because Claimant declined work within his permanent restrictions, did not cooperate in the bid process for replacement work, and essentially abandoned his job. ALJ Fuller awarded future medical treatment based on the opinion of Dr. Lingenfelter.

PRINCIPLES OF LAW AND ANALYSIS

It is the intent of the Legislature the Workers Compensation Act be liberally construed only for the purpose of bringing employers and employees within the provisions of the Act.¹ The provisions of the Workers Compensation Act shall be applied impartially

¹ See K.S.A. 44-501b(a).

to all parties.² The burden of proof shall be on the employee to establish the right to an award of compensation, and to prove the various conditions on which the right to compensation depends.³

1. Claimant proved he is entitled to an award of permanent partial general disability compensation based on work disability.

Claimant argues he is entitled to permanent partial general disability based on work disability considerations. On the other hand, Respondent argues Claimant's award of permanent partial disability compensation should be limited to Dr. Lingenfelter's rating of 2% of the body as a whole.

It is appropriate to award permanent partial general disability compensation based on an injury to the body as a whole where the employee, on account of the injury, is disabled in a manner partial in character and permanent in quality, involving the loss of use of both shoulders.⁴ The extent of permanent partial general disability shall be the percentage of functional impairment the employee sustained on account of the injury as established by competent medical evidence and based on the *AMA Guides*, Sixth Edition, if the impairment is contained therein.⁵

Where an employee sustains an injury to the body as a whole resulting in functional impairment in excess of 7.5% solely from the present injury, or in excess of 10% where there is preexisting functional impairment, and the employee sustains at least a 10% wage loss as defined in K.S.A. 44-510e(a)(2)(E), the employee may receive work disability compensation in excess of the percentage of functional impairment.⁶ In such cases, work disability is determined by averaging the post-injury task loss caused by the injury with the post-injury wage loss caused by the injury.⁷ In determining the wage loss, an appropriate post-injury average weekly wage shall be imputed based on all factors, including but not limited to, the worker's age, physical capabilities, education and training, prior experience and availability of jobs in the open labor market.⁸ Wage loss caused by voluntary

² See *id.*

³ See K.S.A. 44-501b(c).

⁴ See K.S.A. 44-510e(a)(2)(A)(i).

⁵ See K.S.A. 44-510e(a)(2)(B).

⁶ See K.S.A. 44-510e(a)(2)(C).

⁷ See *id.*

⁸ See K.S.A. 44-510e(a)(2)(E).

resignation or termination for cause shall in no way be construed to be caused by the injury. The refusal of accommodated employment within the worker's medical restrictions, as established by the authorized treating physician, at a wage of 90% or more of the pre-injury average weekly wage shall result in a rebuttable presumption of no wage loss.⁹

The Appeals Board must first determine the extent of Claimant's functional impairment. Dr. Lingenfelter, who initially performed a Court-ordered independent medical examination of Claimant and later became the authorized treating physician, initially rated Claimant's impairment at 2% of each shoulder under the *AMA Guides*, Sixth Edition, without explanation, and declined a request to provide a whole-body conversion. Dr. Hufford later converted the rating to 2% of the body as a whole. Dr. Hufford, the subsequent Court-ordered independent medical examiner, rated Claimant's impairment at 10% of the body as a whole under the *AMA Guides*, Sixth Edition. Dr. Hufford explained the basis for his rating. The Board agrees with ALJ Fuller, and finds the opinion of Dr. Hufford more credible on the nature and extent of Claimant's functional impairment, and finds Claimant's functional impairment is 10% of the body as a whole, based on the *AMA Guides*, Sixth Edition, due to bilateral shoulder injuries.

Claimant's 10% whole-body functional impairment meets the functional impairment threshold in K.S.A. 44-510e(a)(2)(C), and the next issue is whether Claimant meets the wage loss threshold for work disability. Claimant is not currently working. The issue of Claimant's entitlement to work disability benefits centers on whether Claimant's actual wage loss was either caused by a voluntary resignation or a refusal to perform accommodated employment paying 90% or more of the pre-injury average weekly wage within the worker's medical restrictions. Either scenario would render Claimant ineligible to receive work disability benefits.

First, the greater weight of the credible evidence proves Claimant did not refuse to perform accommodated employment within his medical restrictions. Claimant was initially offered his old job, which would have paid 90% or more of Claimant's pre-injury average weekly wage, and Claimant refused the job because it was outside his physical capabilities. Although the restrictions imposed by Dr. Lingenfelter, the authorized treating physician, would have allowed Claimant to return to his old job, Dr. Lingenfelter admitted on cross-examination, when confronted with a description of the physical requirements of the job, Claimant would be at risk of reinjury if he performed the job. The position would not have complied with Dr. Hufford's restrictions. Claimant was not offered an actual accommodated job if the job places him at risk of reinjury.

Second, Claimant's conduct during the bidding process was not tantamount to a refusal of accommodated work. Claimant's attendance at the weekly bid sessions was poor, but it is unknown if Claimant would have received most of the jobs identified in the

⁹ See *id.*

bid process. One potential job was identified as Claimant's if he wanted it, but that position may not have complied with Dr. Lingenfelter's restrictions or Dr. Hufford's restrictions. It is also unknown if any of the jobs identified during the bid process would have paid 90% or more of Claimant's pre-injury average weekly wage. Although Claimant's cooperation with the bidding process was poor, there is no evidence Claimant was actually offered an accommodated position within his medical restrictions paying at least 90% of his pre-injury average weekly wage. Thus, the rebuttable presumption of no wage loss in K.S.A. 44-510e(a)(2)(E)(iii) does not apply.

In addition, the record does not prove Claimant's wage loss was caused by voluntary resignation or termination for cause. According to Respondent, the reason for Claimant's termination was retirement. Claimant was not actually terminated for job abandonment or for cause. Arguably, Claimant's retirement could constitute a voluntary resignation, but this occurred after Claimant sustained injuries rendering him physically incapable of returning to his former job and after he unsuccessfully participated in a bid process identifying no other jobs within his medical restrictions paying at least 90% of his pre-injury wages. Claimant's wage loss occurred well before his wife announced his retirement. K.S.A. 44-510e(a)(2)(E)(i) does not apply.

Because K.S.A. 44-510e(a)(2)(E)(i) and (iii) are inapplicable, the Board considers Claimant's wage loss under K.S.A. 44-510e(a)(2)(E). Claimant is not currently engaged in post-injury employment for wages, and the rebuttable presumption of wage-earning capacity does not apply. The Board is tasked with imputing an appropriate post-injury wage based on the factors in K.S.A. 44-510e(a)(2)(E). Dr. Barnett thought Claimant was unemployable, and presumably has no wage-earning capacity, but this opinion is not based on the medical opinions of Dr. Lingenfelter or Dr. Hufford, and does not consider the factors in K.S.A. 44-510e(a)(2)(E). Dr. Barnett did not know Claimant's current residence, which would impact Claimant's wage-earning capacity. Mr. Benjamin, however, considered the factors of K.S.A. 44-510e(a)(2)(E) when he performed his wage-earning capacity analysis, and thought Claimant could earn \$498.00 per week with fringe benefits under Dr. Lingenfelter's restrictions and \$434.56 per week under Dr. Hufford's restrictions. The Board finds the opinions of Mr. Benjamin more credible because his analysis is consistent with the statute, and the Board finds the wage-earning capacity based on Dr. Hufford's restrictions more credible because Dr. Hufford was an independent evaluator of Claimant's medical restrictions. The Board finds Claimant's post-injury average weekly wage is \$434.56. This results in a wage loss of 32%, compared to Claimant's pre-termination average weekly wage of \$637.90, and a wage loss of 41% compared to Claimant's post-termination average weekly wage of \$741.68.

Claimant's permanent functional impairment is 10% of the body as a whole, and he sustained a 32% wage loss on account of the work-related injuries from April 22, 2019, to November 20, 2019, and a 41% wage loss starting November 21, 2019. Claimant is eligible to receive permanent partial disability compensation based on work disability. With regard to Claimant's task loss, Dr. Lingenfelter thought Claimant sustained no task loss

based on his restrictions. Dr. Hufford thought Claimant's task loss, based on either Mr. Benjamin's task list or Dr. Barnett's task list, was 50% based on Dr. Hufford's restrictions. As stated before, Dr. Hufford's opinions on Claimant's restrictions were more credible, and it follows his opinions on Claimant's corresponding task loss are more credible. Therefore, Claimant's task loss is 50%. From April 22, 2019, to November 20, 2019, Claimant is entitled to receive work disability benefits based on 50% task loss and 32% wage loss, or 41% work disability. Starting November 21, 2019, Claimant's wage loss increased to 41%, which results in 45.5% work disability. The Award dated April 13, 2020, should be modified accordingly.

2. Claimant proved he is entitled to an award of future medical treatment.

Respondent sought review of the award of future medical treatment contained in the Award. The employer's liability to pay compensation attaches when an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment.¹⁰ The employer's liability for compensation includes the duty to provide medical treatment as may be reasonably necessary to cure or to relieve the effects of the injury.¹¹ An injury arises out of employment only if the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.¹² It is presumed the employer's obligation to provide medical treatment terminates upon the employee's reaching maximum medical improvement. The presumption may be overcome with medical evidence it is more probably true than not that additional medical treatment will be necessary after maximum medical improvement. "Medical treatment" means treatment provided or prescribed by a licensed health care provider and not home exercises or over-the-counter medication.¹³

In this case, Dr. Lingenfelter testified Claimant would require future medical treatment requiring physician intervention, including prescription medication, injections and consideration of surgery. Dr. Hufford, however, did not recommend future medical treatment. The ALJ found the opinion of Dr. Lingenfelter more credible as the treating physician, and the Board agrees. Moreover, Dr. Lingenfelter's opinion satisfied the low threshold of "medical evidence that it is more probably true than not" contained in K.S.A. 44-510h(e). Therefore, the Board finds and concludes Claimant met his burden of proving entitlement to an award of future medical treatment, and the award of future medical treatment should be affirmed.

¹⁰ See K.S.A. 44-501b(b).

¹¹ See K.S.A. 44-510h(a).

¹² See K.S.A. 44-508(f)(2)(B)(ii).

¹³ See K.S.A. 44-510h(e).

CONCLUSION

Claimant's functional impairment due to his work-related bilateral shoulder injuries is 10% of the body as a whole, as defined by the *AMA Guides*, Sixth Edition. Claimant is entitled to an award of permanent partial general disability benefits based on work disability. Claimant also met his burden of proving entitlement to an award of future medical treatment under K.S.A. 44-510h(e).

AWARD

WHEREFORE, it is the finding, decision and order of the Board the Award of Administrative Law Judge Pamela J. Fuller dated April 13, 2020, is affirmed in part and modified in part.

Claimant is entitled to 15 weeks of temporary total disability compensation, paid at \$425.29 per week, totaling \$6,379.35; followed by 30.29 weeks of permanent partial general disability compensation, paid at \$425.29 per week, based on 41% work disability, totaling \$12,882.03; followed by 162.78 weeks of permanent partial general disability compensation, paid at \$494.48 per week, based on 45.5% work disability, totaling \$80,490.63; for a total award of \$99,752.01 to be paid by Self-Insured Respondent.

As of August 17, 2020, there is currently due and owing 15 weeks of temporary total disability compensation at \$425.29 per week, totaling \$6,379.35; followed by 30.29 weeks of permanent partial general disability compensation based on 41% work disability at \$425.29 per week, totaling \$12,882.03; followed by 38.72 weeks of permanent partial general disability compensation based on 45.5% work disability at \$494.48 per week, totaling \$19,146.27; for a total due and owing of \$38,407.65, which is ordered paid by Self-Insured Respondent in one lump sum less any compensation previously paid. Thereafter, Self-Insured Respondent shall pay Claimant 124.06 weeks of permanent partial general disability compensation based on 45.5% work disability, at \$494.48 per week, until paid in full or unless later modified.

In all other respects, the Award issued by ALJ Fuller is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2020.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: (Via OSCAR)

Scott J. Mann
Gregory D. Worth
Hon. Pamela J. Fuller